should not have been prepared to differ from the judge in the apportionment that he has made, although, if I had tried the case, I should not necessarily have apportioned the damages in exactly the same way. This court has never taken the view that it should alter an apportionment unless there was something seriously wrong with it."

We would dismiss this appeal with costs.

Appeal dismissed.

Solicitors: *Murphy & Dunbar; Sault, Keith Sellar & Co.*

HOE GAN TAI v. FONG CHEE YAN

[F.C. (Azmi L.P., Suffian & Ali F.JJ.) September 19, 1969]

[Penang—Federal Court Civil Appeal No. X.19 of 1969]

Family Law — Divorce — Cruelty — Evidence of petitioner uncontradicted — Whether petitioner has discharged onus.

In this case the learned trial judge had dismissed a petition for divorce on the ground of cruelty, as he held that the petitioner had not proved that she had a reasonable apprehension for her safety or of danger of bodily hurt. In coming to this decision he rejected the evidence of the petitioner that she had been physically assaulted by the respondent. The petitioner appealed.

Held: (1) the petitioner's evidence in such cases should normally be accepted in the absence of contradiction and in the absence of any element of inherent improbability;

(2) there was uncontradicted evidence in this case not only of physical violence but of a long continued series of acts persisted in by the husband causing not just a reasonable apprehension of danger to the appellant's limb and health but actually causing such danger;

(3) the petitioner had therefore proved beyond reasonable doubt cruelty on the part of her husband and therefore there should be a decree of dissolution of marriage.

Cases referred to:—

(1) *Gollins* v. *Gollins* [1964] A.C. 644; [1963] 2 All E.R. 966; affirming [1964] P. 32; [1962] 3 All E.R. 897, 899.

(2) *Saunders* v. *Saunders* [1965] 2 W.L.R. 32.

(3) *Public Prosecutor* v. *Mohamed Ali* [1962] M.L.J. 257.

The following authorities were also cited in argument: *Edwards* v. *Edwards* 106 Sol. J. 590; *Railton* v. *Railton* 106 Sol. J. 454; *Finch* 12 Cr. App. R. 77; *Wright* v. *Wright* [1960] P. 85; *King* v. *King* [1953] A.C. 124; *Waters* v. *Waters* [1956] 1 All E.R. 432; [1956] P. 344; *Henderson* v. *Henderson & Crellin* [1944] A.C. 49, 53; *Moss* v. *Moss* [1916] P. 155, 162; *Benton* v. *Benton* [1958] P. 12 at pp. 19, 24, et seq; *Le Brocq* v. *Le Brocq* [1964] 1 W.L.R. 1085, 1095; *Rayden* on Divorce, 8th ed., pp. 120 et seq.

FEDERAL COURT

Lim Kean Siew (*Miss Pamela Ong* with him) for the appellant.

Respondent absent.

Cur. Adv. Vult.

Suffian F.J.: This is an appeal against the dismissal by the High Court in Penang of the wife-appellant's petition for divorce on the ground of cruelty.

The learned trial judge found that the evidence did not show that there was ground for the petitioner to have a reasonable apprehension for her safety or of danger of bodily hurt and that the petitioner had therefore failed to satisfy him beyond reasonable doubt as to her husband's cruelty.

The evidence in the lower court was brief. This was because, the petition being undefended, the petitioner was not cross-examined and she called only one other witness. If the petition had been defended, no doubt she would have been cross-examined and her counsel would have called other witnesses to amplify her evidence and to fill in any gaps disclosed by the cross-examination. The other witness was a doctor called to prove injuries alleged to have been caused by her husband on two occasions, once in March and once again in April, 1967.

The evidence was as follows. The parties married on 25th September, 1956, and there are two children of the marriage aged about 11 and 5.

At the time of the marriage the husband was a goldsmith. In 1958 he ceased to be a goldsmith and the wife, who worked as a seamstress, taught him to be a cutter for two years. He was not interested in the work. So the wife financed him in a partnership with her nephew in a dress-selling shop. The wife had been working since the age of 16 and contributed over a thousand dollars from her savings towards her husband's capital, finding the rest from her relatives. She financed him in order to make him feel independent and the business was registered in his name. But her nephew withdrew five months later, because the business did not pay. Her husband used to go to work late, took no interest in the business and paid frequent visits to the coffeeshops. In 1966 the wife stopped helping in the shop, the business slackened and she suggested to her husband to close down the business and he agreed.

He did not look for a job. He withdrew money from the bank and from the Post Office, money which had been paid by customers. The appellant had frequent quarrels over money with her husband.

On 28th February, 1967, after a quarrel over money, the husband threatened to throw acid at the appellant. The appellant was frightened and reported to the police. In this report she said that, while she was sewing,

her husband told her not to be big as he could do anything to her, he could hit her and did not mind going to prison for it, and that the previous day he told her that, if she did not heed his word or advice, he would throw acid at her.

At about 9 p.m. the following month, on 28th March, they had an argument because he wanted some of her personal documents and during the argument he fisted her twice on the right cheek. Her sister and an old lady staying in the house came and separated them. She reported this incident also to the police.

On 30th March they had another quarrel during which, according to her third report to the police, he accused her of giving money to other men and he hit her and seized her by the throat.

In all he assaulted her five times.

On one occasion on 14th April, 1967, she was assaulted with a weight used for tailoring. She bled and was admitted to the General Hospital for two or three days. She did not report this to the police. After this she avoided him.

House No. 79, Irving Road, where the appellant lived with her husband, was bought in 1965 and registered in their joint names. The husband had a share in it. They rented out rooms and themselves stayed in one room with the children until August 1967, when the husband moved to another room which had been vacated by some tenants.

The appellant said that her husband was a man of violent temper who used to shout loudly at her. When she was pregnant in 1958 and needed help in the house, the husband did not help but instead spent his time in the coffee-shops. She also said that he constantly threatened to assault her and she was apprehensive as she was all alone in the house. After his last act of assault in April, 1967, his conduct around the house affected the business adversely and she asked her aunt and cousin to speak to her husband about it, but he would make a greater disturbance. She could no longer stay with him, but continued to do so because of the two children. She wanted to buy over his share of the house and was prepared to pay $10,000 for it. He was indifferent to the children and spent most of the time outside, coming home late. As a result of his treatment she suffered mentally.

In 1968 he put salt in the petrol tank of her *Honda*. He wanted her to spend money on repairs out of spite because she did not give him money to spend. He also cut the tyres of her motor-cycle.

As has already been stated, she was not cross-examined, but in answer to the learned trial judge she said that all their quarrels arose over money, that he had not beaten her since April, 1967, and that he had tried to damage her motor-cycle.

The doctor called produced two medical reports signed by another doctor and by him. The first report shows that the appellant was seen in the casualty department of the Penang General Hospital on 31st March, 1967, complaining of having been assaulted, and that she had a bruise over her jaw, another over her elbow and she was tender over the right eye and over the right lower costal region. If true, these injuries must have been caused to her during the argument she had with her husband mentioned in her third police report. The second medical report by the doctor-witness shows that the appellant was in hospital from 14th until 18th April, 1967, complaining of having been assaulted, and that she had *haematoma* over the right frontal region of the head, swelling over the left face just below the eye and a bruise over the dorsum of the left hand. If true, these injuries must have been inflicted during their last quarrel on 14th April, 1967, which she said she never reported to the police.

After hearing the appellant's counsel's address, the learned trial judge dismissed the petition on the spot. This was on 20th February, 1969. His grounds of decision are dated 14th March, 1969. The judgment is rather brief, and it is difficult to say which parts of the evidence the learned trial judge accepted and which he did not. But he did make the following unfavourable comments on the evidence. First, he said that the evidence of cruelty consisted of two medical reports; he made no mention of the three police reports. Secondly, he said that despite the threat of throwing acid on 28th February, 1967, and despite the assault of April, 1967, the appellant continued to live with her husband in the same room until August, 1967, that until the filing of the petition in September, 1968, the appellant had her meals with her husband and the children and until the day of the hearing they were still living in the same house. Thirdly, the learned trial judge observed that the allegations about the *Honda* were unsupported by other evidence. Fourthly, he said that, though her petition alleged that the husband threatened to murder her, she made no reference whatever to this in her evidence. Fifthly, he observed that no evidence had been called to support the allegation of disturbances made by the husband around the house and that the aunt and cousin who were asked to speak to the husband about his conduct around the house were not called. Sixthly, he observed that the appellant's claim

that she was apprehensive of threats by her husband, as she was all alone in the house, conflicted with the evidence that she, her husband and children lived in one room until August, 1967. Seventhly, he observed that the evidence tended to show that the appellant had no grounds to have a reasonable apprehension for her safety or of danger of bodily hurt because her husband was out of the house most of the time, coming home late, and that, though she said she suffered mentally and spent a lot on medical expenses, she had called no evidence to that effect.

I now turn to the law that I think is applicable to this appeal.

What is cruelty? The legal conception of cruelty has not been defined by statute and is generally described as, first, conduct of such a character as to have caused danger to life, limb or health (bodily or mental), or, secondly, as to give rise to a reasonable apprehension of such danger, *Halsbury's* Laws of England, Volume 12, para. 514. It is to be noted that cruelty may consist of either actually causing danger to life, limb or health or, where no such danger has been caused, of giving rise to a reasonable apprehension of such danger. Physical violence may constitute cruelty, but it is not necessary to find physical violence, *Halsbury*, para. 515. The general rule is that the whole matrimonial relations must be considered, and that rule is of special value when the cruelty consists not of violent acts, but of injurious reproaches, complaints, accusations or taunts, *Halsbury*, para. 516.

After *Gollins v. Gollins*,[1] it is no longer necessary to prove that the husband's conduct was aimed at the wife-petitioner. There shortly after the marriage of the parties in 1946 the wife discovered that the husband was considerably in debt and, therefore, unable to support her. Thereafter, over a period of some 14 years, although she lent him considerable sums, he was continually in debt and the wife was troubled by creditors and by bailiffs. From 1957 the husband made no financial contribution to the household while the wife ran a guest house bought in the husband's name, which was the sole support of the family. In September 1960 the wife wrote to the husband, telling him that she could not stand the strain of his debts any longer and warning him that, if he did not get work, she would have to take proceedings. In January 1961 the wife obtained an order against the husband on the ground of his wilful neglect to provide reasonable maintenance. The husband subsequently obtained employment, but paid only a trivial fraction of the amount of maintenance ordered. In April 1961 the wife was diagnosed to be suffering from an anxiety state attributable to her financial and marital difficulties. It was held by the House of Lords that in these circumstances the husband was guilty of cruelty. Lord Reid said at page 667:—

> "I am dealing with a spouse normal in mind and health who has been reduced to ill health by inexcusable conduct of the other spouse persisted in although he knew the damage which he was doing. These matters must be clearly proved. For reasons which I have given, I must hold that they have been proved in this case. They appear to me plainly to establish persistent cruelty."

In *Saunders v. Saunders*[2] Sir Jocelyn Simon P. at page 38 said that after *Gollins'* case the test of cruelty is still:—

> "Was the conduct [of the respondent] of such a grave and weighty nature as to make cohabitation virtually impossible?"

It is for the appellant in the instant case to prove cruelty and to do so beyond reasonable doubt, and in cruelty cases corroboration may be afforded by the evidence of friends, neighbours or doctors who have seen bruises or other external manifestations, *Halsbury*, para. 531.

I am of the opinion that the correct approach to the appellant's evidence is that it should normally be accepted in the absence of contradiction and in the absence of any element of inherent improbability, *Public Prosecutor v. Mohamed Ali*[3]. There Thomson C.J. (as he then was) said at page 258:—

> "If magistrates are going to adopt this sort of attitude to police evidence in connection with road traffic cases there will be an end to all law enforcement in the country. When a police witness says something that is not inherently improbable his evidence must in the first instance be accepted. If he says he saw a cow jumping over the moon his evidence is, of course, not to be accepted, but if he says he saw a cow wandering along one of the main streets of Kuala Lumpur (the sort of thing we all see every day of our lives) there is not the slightest justification for refusing to believe him. Of course if his evidence is contradicted by other evidence or is shaken by cross-examination then it becomes the business of the magistrate to decide whether or not it should be accepted. In the absence of contradiction, however, and in the absence of any element of inherent [im]probability the evidence of any witness, whether, a police witness or not, who gives evidence on affirmation, should normally be accepted."

Applying that test, all the appellant's evidence, which was given, on oath, in the absence of contradiction and in the absence of any element of inherent improbability, should have been accepted by the learned trial judge. But even without disturbing any finding of the learned trial judge on the facts and accepting only that part of the evidence concerning which he did not make any adverse observations, I am of the opinion that the appellant had proved beyond reasonable doubt cruelty on the part of her husband. The learned trial judge did not think so, solely on the ground that the appellant had

not proved that she had a reasonable apprehension for her safety or of danger of bodily hurt. He seems to have ignored the uncontradicted evidence of *physical* violence suffered by the appellant on five occasions and indeed on the last occasion the physical violence resulted in the appellant having to be hospitalized for four days. Here not only was there physical violence but there was also uncontradicted evidence of a long continued series of acts persisted in by the husband causing not just a reasonable apprehension of danger to the appellant's limb and health but *actually* causing such danger. The husband was dependent on the appellant for money (as the learned trial judge found) and the fact (if such be it) that he did not deliberately aim to be cruel to his wife does not make his conduct any the less cruel within the meaning of the law. Like the husband in *Gollins*,[1] the husband here is a layabout, cohabitation between the parties is virtually impossible and the husband falued the marriage so little that he did not even trouble to enter appearance, let alone contest the petition. The permanence of marriage where that is possible is the best guarantee of a secure and happy family life, but the court would add nothing to the preservation of marriage as an institution if it were to continue to bond the husband and wife in the instant case in unholy deadlock.

In the circumstances I would substitute for the learned trial judge's order a decree of dissolution of marriage, this decree *nisi* not to be made absolute until after the expiration of three months from today.

Azmi L.P. and Ali F.J. concurred.

Order accordingly.

Solicitors: *Lim Kean Siew & Co.*

KESATUAN PEKERJA2 KENDERAAN SRI JAYA v. THE INDUSTRIAL COURT & ORS.

[F.C. (Azmi L.P., Suffian & Ali F.JJ.) September 19, 1969]

[Kuala Lumpur — Federal Court Civil Appeal No. X.38 of 1969]

Industrial Law — Trade union — Recognition of — Trade union recognised by employer — Rival trade union applying for recognition — Dispute referred by Minister to Industrial Court — Jurisdiction of Industrial Court — Industrial Relations Act, 1967, ss. 8(4) & 10.

Administrative Law — Prohibition.

In this case the appellant trade union had been accorded recognition by the company employer in February 1968. Under section 10 of the Industrial Relations Act where a trade union has been accorded recognition no other trade union could make any claim for recognition in respect of the same workmen or class of workmen unless a period of two years had elapsed after such recognition has been accorded. The third respondent union contested the appellant union's right to represent the workers of the company. The dispute was referred to the Minister of Labour and acting under section 8(4) of the Industrial Relations Act the Minister referred the matter to the Industrial Court for a decision. The appellant union thereupon filed a notice of motion for an order of prohibition to stay the proceedings of the Industrial Court. Abdul Aziz J. ([1969] 2 M.L.J. 27) held that the Industrial Court had jurisdiction and dismissed the motion. On appeal,

Held, dismissing the appeal: (1) section 10 of the Industrial Relations Act does not prevent an aggrieved trade union from making a claim for recognition to an employer within the period limited by the section; the trade union may make such a claim but the employer would be entitled to refuse to consider it;

(2) on being notified of such refusal the trade union may report to the Minister but once the Minister having failed to resolve the matter, refers it to the Industrial Court, the court is invested with jurisdiction and is obliged to decide it one way or the other.

Authorities cited:—

(1) *Estate & Trust Agencies (1927) Ltd.* v. *Singapore Improvement Trust* [1937] M.L.J. 161; [1937] A.C. 898.

(2) *National Association of Local Government Officers v. Boulton Corporation* [1942] 2 All E.R. 425, 435 (second paragraph).

(3) de Smith on *Judicial Review of Administrative Actions*, 2nd Edn. p. 409.

(4) *Cargo Handling Corporation Ltd.* v. *Cargo Handling Corporation Staff Union* [1966] 2 M.L.J 278; [1967] 2 M.L.J. 98.

(5) *Halsbury's Laws of England*, 3rd Edn. volume 11, pp. 114 & 118.

(6) *Atkins' Encyclopaedia of Court Forms*, volume 10 p. 253.

(7) *Halsbury's Laws of England*, 3rd Edn. volume 36 pp. 387-388, 389-390, 391, 394-395.

(8) *Strouds' Judicial Dictionary*, volume 3, p. 2007.

(9) *Maxwell's Interpretation of Statutes*, 11th edn. pp. 326, 331 and 332.

(10) *Skinner & Company* v. *Shew & Company* [1893] 1 Ch. 413.

(11) *Rands* v. *Oldroyd* [1959] 1 Q.B. 204, 212.

(12) *R.* v. *Industrial Disputes Tribunal* [1954] 2 Q.B. 46.

(13) *R.* v. *Industrial Disputes Tribunal* [1954] 2 All E.R. 730.

(14) *R.* v. *Campbell* [1953] 1 Q.B. 585.

(15) *R.* v. *Comptroller-General of Patents and Designs* [1953] 3 All E.R. 40.

(16) *Roland Burrows' Words and Phrases* volume 4, 75-78.

(17) *Wittaker* v. *Kershaw* (1890), 45 Ch. D. 327.

FEDERAL COURT

S. Woodhull for the appellant.

Mrs. Ng Mann Sau (Federal Counsel) for the 1st respondent.

Ng Mann Cheong for the 2nd respondent.

R. Rajasingam for the 3rd respondent.